BRB No. 03-0721

JAMES A. LONG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: July 7, 2004
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Rutter Mills, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2002-LHC-0954) of Administrative Law Judge Fletcher E. Campbell, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as a shipfitter from 1981 through 1984. He injured his left knee in a work-related accident in 1984. Claimant underwent a medial menisectomy for this injury and returned to work in 1986 with a permanent partial impairment of 10 percent. Claimant continued to work at various jobs until 2001; he experienced intermittent periods of swelling and a burning sensation in his left knee. In May 2001, claimant reported to the hospital emergency room with a chief complaint of swelling of his left

knee for the previous two months and pain in his knee for the previous two weeks. He gave a history that included the previous surgery on his left knee and was diagnosed as suffering from "sprain knee-tendonitis." Subsequently, claimant was seen by an orthopedist, Dr. Larabee, who diagnosed chondrocalcin pyrophosphate disease, also known as pseudo gout, and he established work restrictions for claimant. Cl. Ex. 2. Claimant was referred to an orthopedic specialist, Dr. Lassiter, who was closer to his home. Dr. Lassiter diagnosed chondrocalcinosis of the knee and assigned permanent restrictions which recommended "sedentary sitting type work."[1] Cl. Ex. 3. Claimant did not return to work and sought benefits under the Act.

In his Decision and Order, the administrative law judge found that the evidence established invocation of the Section 20(a), 33 U.S.C. §920(a), presumption that claimant's current knee condition is causally related to his work injury in 1984. The administrative law judge also found that employer failed to establish rebuttal of the presumption. The administrative law judge further found that claimant's restrictions, when compared with his work requirements, established a *prima facie* case of total disability, and he awarded claimant permanent total disability benefits.

On appeal, employer contends that the administrative law judge improperly applied the Section 20(a) presumption as claimant must prove that his 1984 work-related injury caused his current disability. Moreover, employer contends that the administrative law judge erred in finding that the evidence is insufficient to establish rebuttal of the Section 20(a) presumption. Claimant responds, urging affirmance of the administrative law judge's decision as it is supported by substantial evidence and is in accordance with law.

Employer initially contends that the administrative law judge erred in invoking the Section 20(a) presumption. In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by proving the existence of an injury or harm and that a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1993). It is claimant=s burden to establish each element of his *prima facie* case by affirmative proof. *See Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); *see also*

[1] Dr. Lassiter later amended claimant's restrictions to include light duty with a lifting/carrying limit of 15 pounds, no pushing or pulling with arms/legs/body, no bending, stooping, or squatting, no stair or ladder climbing, no crawling, and no standing without breaks every hour. Cl. Ex. 3.

Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 28 BRBS 43 (CRT)(1994). Contrary to employer's contention on appeal, claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused his harm; rather, claimant must show that working conditions existed which could have caused his harm. *See Stevens*, 23 BRBS 191; *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148 (1989); *see generally U.S. Industries/Federal Sheet Metal, Inc.*, 455 U.S. 608, 14 BRBS 631.

In the present case, employer does not dispute that claimant has a harm, *i.e.*, chondrocalcinosis, and the parties stipulated that claimant sustained a work-related injury to his left knee in 1984. Employer nonetheless challenges the administrative law judge's finding that claimant's current condition is related to his 1984 injury. The administrative law judge found claimant established a harm and the occurrence of accident at work, and he relied on Dr. Lassiter's statement that "it is possible that [claimant's chondrocalcinosis] could have been exacerbated by his injury in 1984, but not necessarily caused it," Cl. Ex. 3a, in finding that the accident could have caused the harm. The administrative law judge also noted that claimant told Dr. Lassiter that his knee had hurt "all the time" since 1984. *Id.* The administrative law judge rejected employer's contention that the fact that claimant's chondrocalcinosis had not been documented at the time of the work-related injury in 1984 renders Dr. Lassiter's opinion inadequate for purposes of invoking the Section 20(a) presumption. These findings are rational, and employer's assertions do not alter the fact that claimant established his *prima facie* case, which is all that is required in order to invoke the Section 20(a) presumption. *See Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Brown v. I.T.T./ Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75(CRT) (D.C. Cir. 1990). We therefore affirm the administrative law judge=s finding that claimant invoked the Section 20(a) presumption, as claimant has established a harm and the existence of working conditions which could have caused or aggravated that harm. *See generally Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Bass v. Broadway Maintenance*, 28 BRBS 11 (1994).

Employer also asserts that the administrative law judge erred in finding that it did not establish rebuttal of the Section 20(a) presumption, as the facts of the case are sufficient to draw a negative inference that there is no causal connection between claimant's chondrocalcinosis and his work injury. Once Section 20(a) is invoked, employer bears the burden of producing substantial evidence that the claimant's condition was not caused or aggravated by his employment. If it does so, the presumption falls from the case and the administrative law judge must weigh all of the evidence, with claimant bearing the burden of persuasion on the issue of the work-relatedness of his condition. *See, e.g., Moore*, 126 F.3d 256, 31 BRBS 119(CRT). The

Section 20(a) presumption may be rebutted by negative evidence if the evidence is sufficiently specific to sever the potential connection between a particular injury and a job-related accident. *See id.*; *see also Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Holmes v. Universal Maritime Service Corp.*, 29 BRBS 18 (1995). Moreover, the Board has held that negative evidence, which supplements Apositive@ medical evidence and a credibility determination, may be sufficient to rebut the Section 20(a) presumption. *Holmes*, 29 BRBS at 22; *Craig v. Maher Terminal, Inc.*, 11 BRBS 400 (1979)(Miller, J., dissenting).

Employer contends specifically that rebuttal is established as claimant's chondrocalcinosis was not diagnosed at the time of the work injury in 1984, he continued to work for 15 years outside of his restrictions without follow-up treatment, and the history claimant gave his doctors in 2001 indicates that the pain and swelling had started in the previous six months. We affirm the administrative law judge's finding that this evidence is not sufficient to rebut the Section 20(a) presumption. The administrative law judge considered and rejected employer's contentions regarding the validity of the evidence of record as he found they were unsubstantiated,[2] and thus found the evidence is insufficient to support the negative inference that claimant's disabling knee condition is not work-related. Moreover, the administrative law judge was not persuaded that the absence of a diagnosis of chondrocalcinosis at the time of the work injury was evidence that it did not exist at that time. Unlike the situation presented in *Holmes*, 29 BRBS at 22, there is no other "positive evidence" that severs the causal relationship between claimant's disabling knee condition and the work-related accident.[3] Inasmuch as the administrative law judge acted within his discretion in evaluating the evidence, *see Perini v. Heyde*, 306 F. Supp. 1321 (D.R.I. 1969), and employer has failed to establish that the credibility determinations of the administrative law judge are irrational, we affirm the administrative law judge=s finding that employer did not rebut the Section 20(a) presumption and that claimant=s knee condition is work-related *See generally Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir.1998); *Simonds v. Pittman*

[2] Specifically, the administrative law judge rejected employer's contention that Dr. Lassiter relied on an inaccurate history. In addition, the administrative law judge found that although claimant returned to work for 15 years without seeking further medical treatment, this latency period alone does not establish that claimant does not currently suffer a disabling condition that is causally related to the 1984 work injury. Decision and Order at 6.

[3] The administrative law judge specifically noted that employer did not put in any "positive" evidence and was given the opportunity to depose Dr. Lassiter, but did not do so.

Mechanical Contractors, Inc., 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge